

A **YAM KONG SENG & ANOR**

v.

YEE WENG KAI

B FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ABDULL HAMID EMBONG FCJ
SURIYADI HALIM OMAR FCJ
ZALEHA ZAHARI FCJ
C ABU SAMAH NORDIN FCJ
[CIVIL APPEAL NO: 02-22-05-2013(W)]
19 MAY 2014

D **LIMITATION:** *Striking out action on ground of time bar - Appeal against - Acknowledgement of debt - Requirements of - Whether complied with - Whether short messaging service (SMS) constituted valid acknowledgement - Whether electronic message was as good as in writing - Whether there was acknowledgement of debt which fell within meaning of s. 27(1) Limitation Act 1953 - Whether defence of appellant's case being time barred unsustainable - Electronic Commerce Act 2006, ss. 5, 6, 8 & 9 - Whether applicable - Interpretation Acts 1948 and 1967, s. 3*

F **CIVIL PROCEDURE:** *Pleadings - Acknowledgement of debt - Judicial admission - Admission by a party willing to repay debt in pleading - Whether stands on a higher footing than evidentiary admission - Whether there was a clear judicial admission of debt owed - Whether respondent failed to avoid legal liability*

G **CIVIL PROCEDURE:** *Action - Claim for outstanding sum - Acknowledgement of debt - Requirements of - Whether complied with - Whether short messaging service (SMS) constituted valid acknowledgement - Whether electronic message was as good as in writing - Whether there was acknowledgement of debt which fell within meaning of s. 27(1) Limitation Act 1953 - Whether appellants' action exceeded six years period - Whether defence of appellant's case being time barred unsustainable - Electronic Commerce Act 2006, ss. 5, 6, 8 & 9 - Whether applicable - Interpretation Acts 1948 and 1967, s. 3*

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By an agreement entered into between the plaintiffs ('the appellants') and the defendants in 1997, the appellants had engaged the services of the first defendant ('the company') through the second defendant ('respondent') to build and construct a factory on a piece of land ('the said land'). Collectively, the company and the respondent were referred to as the defendants. The appellants and the defendants reached an agreement whereby monies meant for the progressive payments were to be deposited in the company's account in RHB Bank Bhd. By December 1999, the construction of the factory was completed and after progressive payments had been made, the company, *vide* a letter duly signed by the respondent, confirmed that the outstanding amount due to be refunded to the appellant was RM589,055.61 ('the outstanding sum'). On 14 November 2005, the appellants had, by a short messaging service ('SMS'), demanded from the defendants for the return of the outstanding sum. On 5 September 2006, the respondent sent an SMS to the appellants with the following message "... regarding d loan repayment sorting soon not 2 worry now Im in uk London next week". As the outstanding sum was still not refunded, the appellants filed the action against the defendants. In substance, the appellants' case was that the above SMS message clearly acknowledged the debt, and expressly admitted that the respondent was aware of the outstanding sum and the agreed interest as compensation, due and payable to the appellants. The respondent pleaded that the appellants' cause of action arose in 1999 when the factory was handed over and when the company had issued a letter together with the statement of account. The writ, however, was filed on 7 March 2008. Therefore, it was the respondent's case that by the time the action was filed, limitation had set in. The High Court held that the defence of time bar was not made out by virtue of the SMS on 5 September 2006 being sent out acknowledging the debt and that time had started to run afresh from that date. The respondent thereupon was ordered to pay the judgment sum. The respondent appealed to the Court of Appeal. In allowing the appeal, the Court of Appeal held that in order to constitute a valid acknowledgement for the purpose of s. 26(2) of the Limitation Act 1953 ('the Act'), there must be evidence to show that there was an unequivocal admission of a subsisting debt by the respondent at the time of the acknowledgement. The Court of Appeal

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- A disagreed that the said SMS was an unequivocal admission of a subsisting debt. The Court of Appeal further held that the SMS, being an electronic short message, could not be said to be in writing and was not signed as required by s. 27(1) of the Act and that being so, the SMS could not in law amount to a valid
- B acknowledgement of the debt claimed by the appellants against the respondent. On that premise, the appellants' action had exceeded the six years period and hence was time-barred. Aggrieved by the said decision, the appellants obtained leave to appeal to the Federal Court on the following questions of law
- C (i) whether an admission by a party in a pleading that he was ready and willing to repay a debt was a judicial admission of his liability in respect of such debt; and (ii) whether a message sent by SMS issued by an individual acknowledging a debt was in law an acknowledgement within the meaning of s. 27(1) of the Act.

D **Held (allowing appeal with costs)**
Per Suriyadi Halim Omar FCJ delivering the judgment of the court:

- E (1) In reference to para. 8 of the respondent's defence, it was stated that "... defendants were ready and willing at all material time to settle the said amount within six months ...". The averment was in response to para. 12 of the statement of claim wherein the appellants averred that the company and the respondent had confirmed in writing of the amount owing
- F and payable to them. It is trite law that a judicial admission made in a pleading stands on a higher footing than evidentiary admission (*Sarkar's Law of Evidence*) with the respondent's admission therein be made the foundation of the rights of the parties. Herein, there was a clear judicial admission of the
- G debt owed. The respondent had failed to avoid legal liability. The first question of law in this appeal was therefore answered in the positive. (paras 15-18)
- H (2) Parliament is not unmindful of the march of time as s. 3 of the Interpretation Acts 1948 and 1967 even legislated that 'writing' or 'written' includes electronic storage or transmission of any other method of recording information or fixing information in a form capable of being preserved. Further, s. 8 of the Electronic Commerce Act 2006 ('ECA') provides that
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- where any law requires information to be in writing, the requirement of the law is fulfilled if the information is contained in an electric message that is accessible and intelligible so as to be usable for subsequent reference. An electronic message such as an SMS, with all the attributes of s. 8 being present, is as good as in writing. Herein, the intention of the respondent in the SMS was clear in that there was an acknowledgement of a debt which fell within the meaning of s. 27(1) of the Act. The SMS, though short, reflected the intention of the parties clearly and unambiguously. (paras 19, 21, 27 & 29)
- (3) Signatures need not be written. Suffice if there be any mark, written or not, which identifies the act of the party, perhaps in the form of mark or by some distinguishing feature peculiar only to that person, then the acknowledgement had been signed. The conventional paper is substituted by the mobile phone, which holds a feature that can preserve information or transmissions in the like of the SMS, with the telephone number representing the caller or the sender of some message. It is the norm nowadays to substitute the number of an identified person with his name to assist instant recognition. The fact that the respondent admitted sending the SMS sealed his liability. (para 38)
- (4) Under s. 6 of the ECA, any information shall not be denied legal effect, validity or enforceability on the ground that it was wholly or partly in an electronic form. Section 9 states that where any law requires a signature of a person on a document, the requirement of the law is fulfilled if the document is in the form of an electronic message (the SMS in this case) by an electronic signature. For purposes of this appeal, the legal requirement for a signature was fulfilled as, *inter alia*, the sender was adequately identified let alone admitted by him. Under s. 5 of the ECA, electronic signature means any letter, character, number, sound or other symbol or any combination created in an electronic form adopted by a person as a signature. The telephone number of the respondent from which the SMS was sent confirmed that it came from the respondent *ie* the registered owner of the telephone. (paras 40 & 41)

- A (5) Sections 5, 6, 8 and 9 of the ECA are procedural provisions and applicable to future hearings even though the matters arose before those sections were promulgated. The acknowledgement embedded in the respondent's SMS, being evidential in nature, though forwarded to the appellants before the operation of those provisions of the ECA, was admissible in law and therefore applicable in this appeal. The defence of the appellants' case being time barred was therefore unsustainable. (para 44)
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- C (6) The status of the acknowledgement was answered and found in favour of the appellants. The respondent, being the managing director and majority shareholder of the company was responsible for the debts of the latter. Further, a letter *ie*, P21 clearly acknowledged the respondent's responsibility for the balance of RM589,055.61 being payable to the appellants. This court's view was in line with the factual findings of the High Court. Therefore, the answer to the second question was in the affirmative. (paras 45 & 46)
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E ***Bahasa Malaysia Translation Of Headnotes***

- F Melalui persetujuan yang dimeterai di antara plaintiff ('perayu') dan defendan pada tahun 1997, perayu telah menggunakan khidmat defendan pertama ('syarikat') melalui defendan kedua ('responden') untuk membina sebuah kilang di atas sebidang tanah ('tanah tersebut'). Secara kolektif, syarikat dan responden dirujuk sebagai defendan. Perayu dan defendan telah mencapai persetujuan di mana wang yang dimaksudkan untuk pembayaran progresif akan didepositkan ke dalam akaun syarikat di RHB Bank Bhd. Sebelum bulan Disember 1999, pembinaan kilang telah selesai dan selepas pembayaran progresif dibuat, syarikat, melalui surat yang telah ditandatangani oleh responden, mengesahkan bahawa jumlah tertunggak yang akan dikembalikan kepada perayu adalah RM589,055.61 ('jumlah tunggakan'). Pada 14 November 2005, perayu telah, melalui khidmat pesanan ringkas ('SMS'), menuntut daripada defendan pengembalian jumlah tunggakan. Pada 5 September 2006, responden telah menghantar SMS kepada perayu dengan mesej berikut "... regarding d loan repayment sorting soon not 2 worry now Im in uk London next week". Oleh kerana jumlah tunggakan masih belum dikembalikan, perayu
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memfailkan tindakan terhadap defendan. Pada amnya, kes perayu adalah bahawa mesej SMS tersebut telah dengan jelasnya mengakui hutang, dan dengan nyata mengakui bahawa responden menyedari jumlah tunggakan dan faedah yang dipersetujui sebagai pampasan, terhutang dan kena dibayar kepada perayu-perayu. Responden memplidkan bahawa kausa tindakan perayu berbangkit pada tahun 1999 apabila kilang tersebut telah diserahkan dan apabila syarikat telah mengeluarkan surat bersama-sama dengan penyata akaun. Writ, walau bagaimanapun, telah difailkan pada 7 Mac 2008. Oleh itu, ia adalah kes responden bahawa sebelum masa tindakan telah difailkan, had masa telah bermula. Mahkamah Tinggi memutuskan bahawa pembelaan had masa tidak dibuktikan disebabkan oleh SMS yang telah dihantar pada 5 September 2006 mengakui hutang dan masa telah bermula dari tarikh itu. Responden dengan itu telah diperintahkan untuk membayar jumlah penghakiman. Responden merayu ke Mahkamah Rayuan. Dalam membenarkan rayuan, Mahkamah Rayuan memutuskan bahawa untuk membentuk pengakuan yang sah bagi tujuan s. 26(2) Akta Had Masa 1953 ('Akta'), mesti terdapat keterangan yang menunjukkan bahawa wujud pengakuan yang jelas bagi hutang yang sedia ada oleh responden pada masa pengakuan dibuat. Mahkamah Rayuan tidak bersetuju bahawa SMS tersebut adalah pengakuan jelas bagi hutang yang sedia ada. Mahkamah Rayuan juga memutuskan bahawa SMS, iaitu pesanan ringkas elektronik, adalah tidak bertulis dan tidak ditandatangani seperti yang diperlukan oleh s. 27(1) Akta dan dengan itu, SMS tersebut tidak boleh dari segi undang-undang terjumlah kepada pengakuan sah hutang yang dituntut oleh perayu terhadap responden. Atas premis itu, tindakan perayu telah melebihi tempoh enam tahun dan oleh itu adalah dihalang oleh had masa. Terkilan dengan keputusan tersebut, perayu memperolehi kebenaran untuk merayu ke Mahkamah Persekutuan atas soalan-soalan berikut (i) sama ada pengakuan oleh sesuatu pihak dalam pliding bahawa pihak itu bersedia untuk membayar balik hutang adalah satu pengakuan kehakiman berkenaan liabiliti pihak tersebut berkenaan hutang itu; dan (ii) sama ada mesej yang dihantar melalui SMS oleh seorang individu yang mengakui hutang adalah dari segi undang-undang satu pengakuan dalam pengertian s. 27(1) Akta.

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A Diputuskan (membenarkan rayuan dengan kos)
Oleh Suriyadi Halim Omar HMP menyampaikan penghakiman mahkamah:

- B** (1) Merujuk kepada perenggan 8 dalam pembelaan responden, adalah dinyatakan bahawa "... defendan bersedia pada setiap waktu material untuk menyelesaikan jumlah tersebut dalam tempoh enam bulan ...". Penegasan itu sebagai jawapan kepada perenggan 12 penyata tuntutan di mana perayu menegaskan bahawa syarikat dan responden telah mengesahkan secara bertulis jumlah yang terhutang dan harus dibayar kepada mereka. Adalah undang-undang mantap bahawa pengakuan kehakiman yang dibuat dalam pliding mempunyai nilai yang lebih tinggi daripada pengakuan keterangan (*Sarkar's Law of Evidence*) dengan pengakuan responden di sini menjadi asas hak-hak pihak-pihak yang terlibat. Di sini terdapat pengakuan kehakiman yang jelas berkenaan hutang yang tertunggak. Responden gagal mengelakkan liabiliti undang-undang. Soalan pertama undang-undang dalam rayuan ini adalah dengan itu dijawab secara positif.
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- F** (2) Parlimen tidak sekali-kali lalai dalam perarakan masa kerana s. 3 Akta Tafsiran 1948 dan 1967 telah memperuntukkan bahawa 'tulisan' atau 'bertulis' termasuk penyimpanan atau penghantaran elektronik daripada apa-apa kaedah lain maklumat rakaman atau merakamkan maklumat dalam bentuk yang dipelihara. Selanjutnya, s. 8 Akta Perdagangan Elektronik 2006 ('APE') memperuntukkan bahawa di mana undang-undang memerlukan maklumat secara bertulis, keperluan undang-undang adalah dipenuhi jika maklumat terkandung dalam suatu mesej elektronik yang boleh dicapai dan mudah difahami untuk digunakan sebagai rujukan berikutnya. Mesej elektronik seperti SMS, dengan semua sifat-sifat dalam s. 8, adalah sebaik seperti bertulis. Di sini, niat responden dalam SMS adalah jelas di mana terdapat pengakuan hutang yang termasuk dalam pengertian s. 27(1) Akta. SMS, walaupun pendek, menggambarkan niat pihak-pihak dengan jelas.
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- I** (3) Tandatangan tidak perlu ditulis. Adalah memadai untuk apa-apa tanda, ditulis atau tidak, yang mengenal pasti tindakan pihak, mungkin dalam bentuk tanda atau melalui ciri yang berbeza

- yang khusus semata-mata kepada orang itu sahaja, pengakuan dengan itu adalah ditandatangani. Kertas konvensional digantikan dengan telefon bimbit, yang mempunyai ciri yang boleh memelihara maklumat atau transmisi seperti SMS, dengan nombor telefon mewakili pemanggil atau penghantar mesej. Adalah perkara biasa masa kini untuk menggantikan nombor orang yang dikenal pasti dengan nama untuk membantu pengecaman segera. Fakta bahawa responden mengakui menghantar SMS memeterai liabilitinya. A B
- (4) Di bawah s. 6 APE, maklumat tidak akan dinafikan kesan undang-undang, kesahihan dan penguatkuasaan atas alasan bahawa ia adalah keseluruhannya atau sebahagiannya dalam suatu bentuk elektronik. Seksyen 9 menyatakan bahawa di mana undang-undang memerlukan tandatangan seseorang di atas dokumen, keperluan undang-undang adalah dipenuhi jika dokumen dalam bentuk mesej elektronik (SMS dalam kes ini) melalui tandatangan secara elektronik. Untuk tujuan rayuan ini, keperluan undang-undang untuk tandatangan adalah dipenuhi kerana, antara lain, penghantar adalah dikenal pasti secukupnya dan juga diakui olehnya. Di bawah s. 5 APE, tandatangan elektronik bermaksud mana-mana huruf, ciri, nombor, bunyi atau simbol atau mana-mana gabungan yang dicipta dalam bentuk elektronik yang diterima oleh seorang sebagai satu tandatangan. Nombor telefon responden dari mana SMS telah dihantar mengesahkan bahawa ia datangnya daripada responden iaitu pemilik berdaftar telefon. C D E F
- (5) Seksyen-seksyen 5, 6, 8 dan 9 APE adalah peruntukan prosedur dan adalah diguna pakai untuk perbicaraan masa depan walaupun halperkara berbangkit sebelum seksyen-seksyen itu diisytiharkan. Pengakuan yang terbenam dalam SMS responden, yang bersifat keterangan, walaupun dihantar kepada perayu sebelum penguatkuasaan peruntukan APE, adalah diterima masuk dari segi undang-undang dan diguna pakai dalam rayuan ini. Pembelaan bahawa kes perayu adalah dihalang oleh had masa adalah dengan itu tidak boleh dipertahankan. G H
- (6) Status pengakuan adalah dijawab dan didapati memihak kepada perayu. Responden, sebagai pengarah urusan dan pemegang saham majoriti syarikat, adalah bertanggungjawab I

- A untuk hutang-hutang syarikat. Selanjutnya, surat iaitu P21 dengan jelasnya mengakui tanggungjawab responden bagi baki RM589,055.61 yang perlu dibayar kepada perayu. Dapatan mahkamah ini adalah selaras dengan penemuan fakta Mahkamah Tinggi. Oleh itu, soalan kedua adalah dijawab secara afirmatif.
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Case(s) referred to:

- Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd* [1997] 4 CLJ 437 CA (**dist**)
- C *Bank of India, Petitioner v. James Fernandez and Anor* AIR 1988 Ker 89 (**refd**)
- Central Bank of India v. Hartford Fire Insurance* AIR [1965] SC 1288 (**refd**)
- Kamala Devi v. Seth Takhatmal* AIR [1964] SC 859 (**refd**)
- Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23 FC (**refd**)
- D *Morton v. Copeland* (1855) 16 CB 517 (**refd**)
- PP v. Datuk Haji Harun Haji Idris* [1976] 1 LNS 96 HC (**refd**)
- Satish Mohan Bindal v. State of UP* AIR 1986 All 126, 128; 1985 All CJ 507 (**refd**)
- Selangor United Rubber Estates Ltd v. Cradock and Ors* (No. 3) [1968] 2 All ER 1073 (**refd**)
- E *Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd* [2006] 2 CLJ 337 CA (**refd**)
- SM Integrated Transware Pte Ltd v. Schenker Singapore (Pte) Ltd* [2005] 2 SLR 651 (**refd**)

Legislation referred to:

- F Electronic Commerce Act 2006, ss. 5, 6, 8, 9
- Interpretation Acts 1948 and 1967, ss. 3, 17A
- Limitation Act 1953, ss. 26(2), 27(1)
- Companies Act 1948 [UK], s. 167(2)
- G Companies Act 1967 [UK], s. 50

Other source(s) referred to:

- FAR Bennion MA, *Bennion on Statutory Interpretation*, 5th edn, pp 889-890
- Halsbury's Law of England*, 4th edn, vol 44(1), para 1287
- H Jacob and Goldrein, *Pleadings: Principles and Practice*, 1990, pp 133-134
- NS Bindra's *Interpretation of Statute*, p 1115
- Words and Phrases and Maxims*, vol 13, p 683

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For the appellants - Malik Imtiaz Sarwar (Ronnie Yoon, ML Wong, Jenine Gill & Pavendeep Singh with him); M/s Scully Yoon **A**

For the respondent - M Menon (Kamaldip Kaur with him); M/s David Lingam & Co

[Editor's note: For the Court of Appeal judgment, please see Yee Weng Kai v. Yam Kong Seng & Anor [2013] 4 CLJ 493.] **B**

Reported by Suhainah Wahiduddin

JUDGMENT **C**

Suriyadi Halim Omar FCJ:

[1] By an agreement entered into between the plaintiffs (hereinafter referred to as the appellants) and the defendants in 1997, the appellants had engaged the services of the first defendant ("the company") through the second defendant ("respondent") to build and construct a factory on a piece of land bearing the postal address of Lot 6486 No 2 Jalan PJS 3/2, Taman Medan, Mukim Petaling, off Old Klang Road, 46000 Petaling Jaya, Selangor Darul Ehsan ("the said land"). For easy reference, collectively the company and the respondent will be referred to as the defendants. **D**
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[2] Due to the requirements demanded by capital control measures imposed by the Malaysian Central Bank, and in order to facilitate progressive payments in respect of the construction of the factory, the appellants and the defendants agreed that monies meant for the progressive payments be deposited in the company's account in RHB Bank Bhd. The sum deposited in September 1998 was RM1,310,000. **F**
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[3] By December 1999 the construction of the factory was completed and after progressive payments had been made, the company *vide* a letter dated 17 December 1999 duly signed by the respondent, confirmed that the outstanding amount due to be refunded to the appellant was RM589,055.61 (the outstanding sum). This sum was not promptly refunded and a grace period of six months was granted to the defendants to refund it. Exchanges took place and on 14 November 2005 the appellants had by a short messaging service (SMS) demanded from the defendants the **H**
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A return of the outstanding sum together with the agreed interest as compensation by 24 December 2005. On 5 September 2006, the respondent by an SMS sent to the appellants the following message (*verbatim*):

B Eddy sorry hear ur father death, regarding d loan repayment sorting soon not 2 worry now Im in uk London next week.

[4] As the outstanding sum was still not refunded the appellants filed the action against the defendants. The accumulated sum claimed by the appellants totalled RM1,531,538.93 as at 31 December 2007. In substance the appellants' case was that the above SMS message clearly acknowledged the debt, and expressly admitted that the respondent was aware of the outstanding sum and the agreed interest as compensation, due and payable to the appellants. The appellants also pleaded that on 28 December 2007 the defendants had acknowledged the debts.

[5] Much of the agreed issues at the High Court centred on the acknowledgement in the SMS *viz.* whether it was a fresh acknowledgement, and its effect under the Limitation Act 1953 ("the Act"), the issue of limitation being the mainstay of the respondent's defence. The respondent pleaded that the appellants' cause of action arose on 7 July 1999, or when the factory was handed over also in 1999, or 17 December 1999 when the company issued a letter together with the statement of account. The writ was filed on 7 March 2008. Therefore by the time the action was filed limitation had set in. The eventual High Court's decision on 22 September 2010 was in favour of the appellants.

[6] The learned trial judge found the following. The appellants had placed RM1,310,000 in the name of the company and upon completion of the factory's construction a final progressive claim was paid out. The final amount paid out was RM434,169.85 thus leaving a balance of RM589,055.61. The company *vide* letter dated 17 December 1999, duly signed by the respondent, stated that the amount was due to be refunded to the appellants. The learned judge held that the defence of time bar was not made out by virtue of the 5 September 2006 SMS being sent out acknowledging the debt. The authenticity of the SMS was verified and the respondent had admitted sending out the SMS to the appellant. The learned judge held that time started to run afresh from that date. Even though the respondent had asserted that

there was no privity of contract between the appellants and him the letter of 17 December 1999, signed by him was clearly issued to one “Mr Yam Kong Seng and family” and clearly stated that the “Balance payable to ‘Yam’s family RM589,055.61”. The respondent and the company were thus precluded from taking the point of privity. The respondent thereupon was ordered to pay the judgment sum of RM589,055.61 with interest at 1% per month.

[7] The company filed no appeal as it was wound up even before judgment was entered against it. The respondent on the other hand appealed to the Court of Appeal. On 30 January 2012 the appeal was unanimously allowed by the Court of Appeal with costs and the High Court’s order was set aside.

[8] In allowing the appeal the Court of Appeal *inter alia* adjudged that s. 26(2) of the Act recognised the right of action in cases where the debtor acknowledged the claim, or made any payment in respect thereof, which shall be deemed to have accrued on and not before the date of the acknowledgement. In short, in order to constitute a valid acknowledgement for the purpose of s. 26(2) of the Act there must be evidence to show that there was an unequivocal admission of a subsisting debt by the respondent at the time of the acknowledgement. The Court of Appeal disagreed that the said SMS was an unequivocal admission of a subsisting debt, as it did not quantify the debt in figures nor was it capable of ascertainment by calculation or by extrinsic evidence. Further, the SMS was ambiguous and unclear as it referred to the “loan repayment”, an issue which was pleaded, the Court of Appeal further held that the SMS being an electronic short message could not be said to be in writing and was not signed as required by s. 27(1) of the Act. Though it could have come from the respondent’s hand phone that did not necessarily mean that he actually sent out the message. That being so the SMS could not in law amount to a valid acknowledgement of the debt claimed by the appellants against the respondent. On that premise the appellants’ action had exceeded the six years period and hence was time-barred. There was no evidence, either in the form of document or otherwise adduced during the trial to show that the respondent had held himself out to be personally liable for the amount claimed by the appellants. The liability to refund or to repay the amount claimed by the appellants was with the company and not with the respondent.

- A [9] Aggrieved by the decision of the Court of Appeal, the appellants successfully obtained leave to appeal to the Federal Court on 23 April 2013, on the following questions of law:
- B (i) whether an admission by a party in a pleading that he is ready and willing to repay a debt is a judicial admission of his liability in respect of such debt; and
- C (ii) whether a message sent by short messaging service (SMS) issued by an individual acknowledging a debt is in law an acknowledgement within the meaning of s. 27(1) of the Limitation Act 1953.

The Positions Taken Up By Parties Before Us

- D [10] The appellants reiterated that their claim was premised on the fact that they had engaged the company through the respondent, who was the managing director of the company, to build a factory on the said land. By September 1998 the appellants had transferred and deposited monies totalling RM1,310,000 to the company to facilitate the progressive payment for work done for the construction of the factory. There was no dispute as to that deposit.

- F [11] The construction of the factory was completed in December 1999. The appellants paid the final amount of RM434,169.85 thereby leaving a balance of RM589,055.61. The company *vide* letter dated 17 December 1999 also acknowledged that the latter sum was the amount outstanding and due to be refunded to the appellants. An earlier letter of 12 December 1999 stated that the final amount due to the company was RM480,977.17, with the amount due to be refunded to the appellants being RM589,055.61. Notwithstanding these letters the company and the respondent failed to refund the balance.

- H [12] The respondent went on the argument that though he and the company were ready and willing to settle the said amount, the absence of an agreement on the rate of interest and lack of unequivocal written demand had hindered the return of the refundable sum. He also averred that the appellants in not pursuing their claim promptly were guilty of acquiescence, waiver,

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and laches and that the claim was statute-barred. Further, the respondent took the simplistic approach of contending that he was not to be held accountable for any liability, on account of being a mere director and an agent to the company. The liability if any was the sole responsibility of the company. In support of its case the case of *Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd* [1997] 4 CLJ 437 was referred to by the respondent.

[13] In respect of the issue of limitation, the appellants reiterated the stand that the SMS sent by the respondent *via* his mobile to the first appellant's mobile number amounted to a fresh acknowledgement of the debt due, with time beginning to start afresh. As regards the defence on acquiescence, waiver, and laches, though pleaded, were abandoned by the respondent.

Basic Findings

[14] We find that the parties were not disputing the existence of an agreement in respect of the construction of the said factory or that payments had been made out to the company. The main issues left for consideration were whether there was a judicial admission and whether the respondent could be held liable for the claimed sum.

First Question

[15] To enable us to ascertain whether there was a judicial admission we need to refer to para. 8 of the defence. It reads as follows:

8 ... Further Defendants 1 & 2 aver that the Defendants were ready and willing at all material time to settle the said amount within six months but as there was no mutual agreement as to a fixed rate of interest or whether there was any interest at all, the date of breach was not fixed, and lack of a unequivocal written demand all of which put the whole outstanding sum for repayment in dispute ...

[16] The above averment was in response to para. 12 of the statement of claim wherein the appellants averred that the company and the respondent had confirmed in writing of the amount owing and payable to them. It is trite law that a judicial admission made in a pleading stands on a higher footing than

- A evidentiary admission (*Sarkar's Law of Evidence*) with the respondent's admission therein be made the foundation of the rights of the parties (*Satish Mohan Bindal v. State of UP* AIR 1986 All 126,128; 1985 All CJ 507). Any failure on the part of the respondent to rebut the admission to avoid the legal consequences of his admission would entitle the appellants to enter judgment against him.

- [17] Having perused the defence in particular para. 8, we find that there is clear judicial admission of the debt owed. The question that must follow would be whether the respondent was avoiding responsibility to pay up. In Jacob and Goldrein's *Pleadings: Principles and Practice* [1990] at pp. 133-134 in dealing with confession and avoidance, the following is stated:

D Confession and Avoidance Meaning

- E The term 'confession and avoidance' is the description of a plea in the defence which, while expressly or impliedly admitting or confessing or assuming the truth of the material facts alleged in the statement of claim, seeks at the same time to avoid or destroy the legal consequences of those facts. The plea is invoked by alleging fresh or additional facts to establish some legal justification or excuse, or some other ground for avoiding or escaping legal liability. The defendant, as it were, confesses the truth of what is alleged against him but proceed immediately to 'avoid' the effect of such allegations.

- F [18] Having scrutinised the defence we find that the respondent has failed to avoid legal liability. With there being judicial admission by the respondent sufficient to hold him liable to the amount claimed the answer to the first question of law in this appeal must be answered in the positive.

G *Second Question*

- [19] We now touch on the second question for our determination. To appreciate this question it is necessary for us to refer to the chronology of events that led to the SMS being sent to the appellants by the respondent. The appellants pleaded that the respondent had on behalf of himself and the company sent to the first appellant the abovementioned SMS on 5 September 2006. The SMS was a reply to the first appellant's demand of payment of the debt and the interest due and owing to the appellants. The

SMS though short, reflected the intention of the parties clearly and unambiguously. There was no difficulty in putting into effect what they had bargained for on reading the words of the SMS (*Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23; *Central Bank of India v. Hartford Fire Insurance* AIR [1965] SC 1288; *Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd* [2006] 2 CLJ 337). The court in *Kamala Devi v. Seth Takhatmal* AIR [1964] SC 859 opined:

If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the Court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions.

[20] Currently acknowledgement, documentary or otherwise, may come in the form of an affirmation by thumb prints (openly accepted by courts to cater to the needs of the unfortunate and illiterates), identifiable voice evidence from tape recorders, CCTV, video-conferencing (made permissible by the Evidence Act 1950) and the like. Malaysia is no more the laggard in this technologically fast moving world and gone are the archaic days when literal interpretations of the law were the order of the day. Despite the acceptance of modern construction and purposive approach in cases or statutes, before an acknowledgement is accepted by courts, it still must be proved by admissible evidence. It may be proved like any other fact.

[21] The intention of the respondent in the SMS was clear in that there was an acknowledgement of a debt which fell within the meaning of s. 27(1) of the Act. The element of interest could be proved in a full trial, and the lack of its mention in the SMS did not in any way cause ambiguity, or led to the detraction of the acknowledgement.

[22] The next relevant issue is whether the acknowledgement sent by the SMS affirmed the respondent's liability. The respondent in reply submitted that the acknowledgement was flawed as it was not written let alone signed. He ventilated that the court must still put into effect the demands of the provisions, however archaic they might be.

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A [23] The provisions surrounding an acknowledgement of debt in the context of the Act are found in ss. 26(2) and 27(1). Section 26(2) of the Act reads:

B Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable or accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment.

C [24] Section 27(1) of the Act reads:

D Every such acknowledgement as is referred to in section 26 or in the *proviso* to section 16 of this Act shall be in writing and signed by the person making the acknowledgement.

[25] On the evidential aspect not surprisingly much emphasis was put by the respondent on the acknowledgement to be in writing and signed.

E *Requirement Of Being In Writing*

F [26] Before moving on we need to clarify that the discussion here is restricted to procedural (evidential) matters only and will avoid discussing substantive matters, say lease, where to be enforceable there must exist some written memorandum. We have left the discussion of the latter matters to another more appropriate forum.

G [27] The respondent has come out strongly and ventilated that there is nothing difficult about ss. 26(2) and 27(1) of the Act and thus must be read in their literal context. Regretfully we are unable to agree with the respondent's argument on this point. Parliament is not unmindful of the march of time as s. 3 of the Interpretation Acts 1948 and 1967 even legislated that 'writing' or 'written' includes electronic storage or transmission or any other method of recording information or fixing information in a form capable of being preserved. This definition is a departure from the old and established definition which envisages the involvement of papers, parchment and the like, and of course the physical human touch. In *Bank of India, Petitioner v. James Fernandez and Anor* (AIR 1988 Ker 89) the court opined that:

I Writing need not be by hand itself. It can be printed or type-written or by other possible methods.

[28] *Black's Law Dictionary* defines writing as:

... any intentional recording of words that may be viewed or heard with or without mechanical aids. This includes hard-copy documents, electronic documents on computer media, audio and videotapes, e-mails, and any other media on which words can be recorded.

[29] Section 8 of the Electronic Commerce Act 2006 ("ECA") provides that where any law requires information to be in writing, the requirement of the law is fulfilled if the information is contained in an electronic message that is accessible and intelligible so as to be usable for subsequent reference. In a word a message from an SMS, with all the attributes of s. 8 being present *viz.* accessibility, intelligible and extractable for subsequent reference, such an electronic message is as good as in writing. More on the ECA later.

[30] With the prevailing technological advancement made (and unstoppable at that), record keeping for businesses or daily affairs exchange have moved away from the laborious format of writing to the overly dependence on computers, and of which the mobile phone is one. In short we are slowly turning into a paperless society. Dictated by common sense and justice it is no surprise that not only the conservative courts but also Parliament have taken the approach that writing need not be handwritten (*SM Integrated Transware Pte Ltd v. Schenker Singapore (Pte) Ltd* [2005] 2 SLR 651). It follows to reason that a party alleging that a communication eg, a forwarded message was sourced from, say, an electronic storage, transmission, or any other method of recording information or fixing information in a form capable of being preserved, then such communication must be construed as in writing. By similar deduction the acknowledgement here therefore was in writing.

Requirement Of Acknowledgement To Be Signed

[31] In everyday parlance, when a document has been signed it means that a signature, invariably handwritten and often fanciful stylised depiction of someone's name, nickname, or even a simple X or other marks has been left on it. The traditional function of a signature is evidential ie, to give evidence of identity and having the intention to be bound by the signed document.

- A [32] No controversy will arise if a signature helps to identify the signatory of a particular document and more useful will it be if not denied subsequently by him. In a situation where the authenticity of the signature is being challenged the conclusiveness of a signature remains elusive; a signature thus is challengeable and may be validated or invalidated.
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- [33] As regards signature that is not written (and hence not possessing the characteristics of a fanciful or stylised mark), we find the remarks in *NS Bindra's 'Interpretation of Statute'* at p. 1115 useful. The author wrote:
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Signature-A signature is only a mark, and where a statute merely requires that a document shall be signed, the statute is satisfied by proof of the making of a mark upon the document by or the authority of the signatory.

- D [34] In *Words and Phrases and Maxims* vol. 13 at p. 683 signature is defined as:

- E signature is the name of person written on a document to signify that the writing accords with his wishes or intentions. This is what is ordinarily meant by speaking of a person's 'signature', but the law does not always insist upon the name of the person being written; initials or a mark intended to represent a person's name have been held to be a sufficient 'signature' by him ...

- F [35] In *Morton v. Copeland* (1855) 16 CB 517 Maule J had occasion to state:

- G The necessity of signatures arises in every case from the express requirement of the statute. Signature does not necessarily mean writing a person's Christian and surname, but any mark which identifies it as the act of the party.

[36] In *Bank of India, Petitioner v. James Fernandez and Anor* (AIR 1988 Ker 89), S Padmanabhan J in no uncertain term said:

- H Various modes of signing have been recognized in law. Thumb impression or mark or line or cross is accepted as signature in the case of persons who could not write due to illiteracy or physical inability ...

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[37] In *The Law Lexicon* (by P Ramanatha Aiyar) ‘signed’ is defined as follows: A

“signed” includes “marked” when the person making the mark is unable to write his name ...

[38] From the above mundane approach of alluding to authoritative books and cases it has been satisfactorily established that signatures need not be written. Suffice if there be any mark, written or not, which identifies the act of the party, perhaps in the form of mark or by some distinguishing feature peculiar only to that person, then the acknowledgement has been signed. Analogically we hold the view that the conventional paper is substituted by the mobile phone, which holds features that can preserve information or transmissions in the like of the SMS, with the telephone number representing the caller or the sender of some message. In fact it is the norm nowadays to substitute the number of an identified person with his name to assist instant recognition. The fact that the respondent admitted sending the SMS sealed his liability. B
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[39] Besides the 1948 and the 1967 Interpretation Acts, and being forward looking, the ECA was legislated in order to deal with some of the latest technological strides, apart from contributing to business efficacy and building the confidence of investors and public at large. Section 17A of the 1948 and 1967 Interpretation Acts, which demands courts to interpret all legislative provisions purposively, to be followed in its wake by the ECA, clearly indicates Parliament’s intention to keep pace with time. F.A.R Bennion MA, *Bennion on Statutory Interpretation* 5th edn. (pp. 889-890) could not have put it in better terms when he authored: E
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It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed (an updating construction). While it remains law, it is to be treated as always speaking ... H

[40] Under s. 6 of the ECA it is legislated that any information shall not be denied legal effect, validity or enforceability on the ground that it is wholly or partly in an electronic form. Section 9 of the ECA is more comprehensive in that where any law requires I

A a signature of a person on a document, the requirement of the law is fulfilled if the document is in the form of an electronic message (the SMS in this case), by an electronic signature subject to the collective demands of sub-paras. (a) to (c). For purposes of this appeal the legal requirement for a signature is fulfilled as, *inter alia*,
B the sender is adequately identified let alone admitted by him. To complete this issue, under s. 5 of the ECA electronic signature means any letter, character, number, sound or other symbol or any combination created in an electronic form adopted by a person as a signature.

C [41] The telephone number of the respondent which carried the number 012-2056363, from which the SMS was sent, confirmed that it came from the respondent ie, the registered owner of that telephone. PW3 confirmed the fact that the respondent was the
D registered owner of the mobile phone (pp. 195-196 of the appeal records). Unless rebutted by the respondent the SMS must have come from the respondent. The probability of successfully rebutting the respondent being the sender is next to nil as the respondent at questions 20 and 21 (pp. 208 and 209) admitted sending the
E message on 5 September 2006.

[42] The respondent attempted to neutralise the ECA argument by submitting that the provision in it were not raised at the High Court or the Court of Appeal by both parties. Regretfully he stopped short of clarifying whether the ECA should be read
F prospectively or retrospectively. It is pertinent to note that the ECA came into force on 19 October 2006 ie, after the 5 September 2006 SMS was transmitted, with the claim being filed by the appellants on 7 March 2008. In simple terms the
G ECA had been legislated a good two years earlier prior to the filing of the claim. It is incontrovertible that the SMS is a mere piece of evidence and nothing more. It is trite law that there is no presumption against retrospection on matters that deal with procedure. Evidence is part of procedure. In *Halsbury's Law of England* (4th edn.) vol 44(1) para. 1287 the following remarks are
H found:

The general presumption against retrospection does not apply to legislation concerned merely with matters of procedure; on the contrary, provisions of that nature are to be construed as
I retrospective unless there is a clear indication that such was not the intention of Parliament. For this purpose 'procedure' includes matters relating to remedies, defences, penalties, evidence ...

[43] In *Selangor United Rubber Estates Ltd v. Cradock and Ors (No. 3)* [1968] 2 All ER 1073 (Chancery), the plaintiff ie, Selangor URE Ltd had commenced an action against Cradock and several others. During the hearing a question arose as to whether transcripts of the eighth defendant which were taken by inspectors pursuant to s. 167(2) of the Companies Act 1948 were admissible in evidence against him pursuant to s. 50 of the Companies Act 1967. This question went back to an earlier criminal proceeding conducted by a magistrate who had held that the transcripts should not be relied upon. He reasoned that no express provisions about the admissibility of those transcripts were provided for in the law and hence were inadmissible in evidence. The magistrate's decision was made before s. 50 of the Companies Act 1967 came into operation. This latter section provides that an answer (in the transcripts) given by a person to a question put to him in exercise of powers conferred by s. 167 of the Companies Act 1948 may be used in evidence against him. The court held that the absence of the express provision relied on by the magistrate was cured by the passing of s. 50 of the Companies Act 1967. Ungood-Thomas J explained it in this manner:

Section 50 is a procedural provision providing for the admissibility of evidence before a court when it comes to hear a case and deal with the evidence. It applies to future hearings after the Act of 1967 comes into operation; but it then applies even though the hearing be in respect of matters which arose before that section was passed. It is a procedural provision dealing with future procedure ...

The position therefore is that in my view the transcript is admissible as evidence in accordance with the provision of Act 1967.

[44] It is now on established law that the presumption of statutes being *prima facie* prospective, does not apply to provisions dealing with procedure, which includes evidence (*Public Prosecutor v. Datuk Haji Harun bin Haji Idris* [1976] 1 LNS 96; [1977] 1 MLJ 14 (FC)). In the circumstances of this appeal ss. 5, 6, 8 and 9 of the ECA are procedural provisions and applicable to future hearings even though the matters arose before those sections were promulgated. The acknowledgement embedded in the SMS of 5 September 2006 being evidential in nature, though forwarded to the

- A appellants before the operation of those provisions of the ECA, is admissible in law and therefore applicable in this appeal. The defence of the appellants' case being time-barred is therefore unsustainable.
- B [45] Now that the status of the acknowledgement is answered, and found in favour of the appellants, the final question to be resolved is whether the respondent, being the managing director and majority shareholder of the company is responsible for the debts of the latter. We find little difficulty in rejecting the applicability of *Abdul Manaf Mohd Ghows & Ors v Nusantara Timur Sdn Bhd* [1997] 4 CLJ 437 as the facts in that case are distinguishable to the current appeal. There Siti Norma JCA (as Her Ladyship was then) found that the second and third respondents could not be held out to be personally liable for the debts of the company as there was no conclusive evidence adduced to make them liable. In the current appeal, from the evidence adduced and discussed earlier, specifically the letter dated 17 December 1999, again the answer must be found in favour of the appellants. This letter ie, P21 clearly acknowledged the respondent's responsibility for the balance of RM589,055.61 being payable to the appellants. Our view is in line with the factual findings of the High Court.
- E [46] We therefore answer the second question in the affirmative.
- F [47] The appeal is thus allowed with costs.

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